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when asked what happened, the woman stated that defendant had physically assaulted her and tried to suffocate her baby. This qualified as a spontaneous statement (Id. at p. 1388.)

The second aspect of section 1240 is to describible actions undertaken without deliberation or reflection. The latter is what is intended in (Evidence Code section 1240) (People v. Farmer (1989) 47 Cal. 3d 888, 903.) In Farmer, the Court approved admission of spontaneous statements uttered in response to a lengthy police interrogation because the declarant was in intense pain from gunshot wounds, rightfully concerned about his survival, and so preoccupied that he had little opportunity and incentive to deliberate. (Id. at p. 904; see also (People v. Poggi, supra 45 Cal. 3d, at pp. 319-320) [statements admissible on facts similar to Farmer].)

At the same time, however, the Farmer Court cautioned that it is a rare thing to permit the admission of answers to extensive and belated questioning as spontaneous utterances. (People v. Farmer, supra, 47 Cal. 3d at p. 904.) Indeed, the general rule is that statements made in response to questions posed by officers after the declarant has time to reflect should not be admitted. (People v. Keelin (1955) 136 Cal. App. 2d, 860, 870) [error to admit as spontaneous statements responses to questions a considerable time after the event.]) Further, although a time element may not be mechanically applied, it is an important factor. (See also Wiley V. Easter (1962) 203 Cal. App. 2d 845, 854-855.) [questions from a police officer some 20-60 minutes after the event require the declarant to pause and think; responses not spontaneous statements].)

In (People V. Pearch (1991) 229 Cal. App. 3d. 1282) about an hour an 45 minutes before his death, the victim's called his brother, told him he was being hurt, and asked to borrow money. (Id. at p. 1288.) The trial court admitted the victim's statement that he was being hurt as a spontaneous statement. (Id. at p. 1289.) The reviewing Court disagreed because there was nothing in the record suggesting the victim did not have an opportunity to reflect in the interim between the time he was hurt and the time of the phone call. Nothing in the record showed he was in an excited state and unable to reflect or deliberate when he made that call (Id at pp. 1290-1291.) Therefore, the trial court erred in admitting the victim's statements under the spontaneous declarations exception to the hearsay rule. (Id. at p. 1291.) The court reversed the defendant's conviction for the erroneous admission of hearsay statements. (Id at p. 1295.)

The statements in the instant case do not fall within the parameters established by the statute or decisional law because the declarant was not near death or suffering intense pain, and because, as was the situation in Pearch, Janette had ample of time to Clam herself, discuss the events with Martinez and her mother, brush her teeth, make phone Calls and deliberate before responding to the officers' questions.

When the prosecutor started to elicit from officer Mendoza hearsay Consisting of what Janette told him in response to his question during his interview with Janette, Moran's attorney objected on hearsay grounds. The Court sustained the objection. (6 RT 1580-1581.) The prosecutor insisted that the hearsay was admissible as a prior inconsistent statement, and not admitted for the truth of the matter. Petitioner objected and sought an offer of proof. (6 RT 1584.) The Court ordered the prosecutor to make such an offer but not satisfied with that offer delayed ruling until the following day. (6 RT 1587.)

The very next morning the defense came prepared to argue that the doctrine of prior inconsistent statements did not apply. (7 RT 1806-1810.) But, without notice to the defense, the prosecutor changed tactics, now arguing that Janette's responses to the officer's questions really were "spontaneous utterances" and presenting the Court with cases on that new subject. (7 RT 1804-1806.)

Petitioner objected vehemently because there was nothing "spontaneous" about her responses to the police officer's questions. The Crime started at 3:15 am. The officer took her statement (Two hours) Later. (7 RT 1813; 2 CT 387.) The prosecutor argued there was only a nine (9) minute interval between the end of

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the crime and officer Mendoza's interview (7RT 1815-1816.) That is a virtual impossibility. As counsel explained, the prosecutor was "Playing games with the clock." (7 RT 1817-1818.) First, Janette and Martinez sat in his car for ten or 15 minute after their assailants left, discussed the matter and what had happened to Janette, and jointly decided what to do.

"And on the way to Janette's house we were thinking and trying to decide whether to make a report or not to make a report to the police about the incident. [¶] And we got to the agreement that we had to make a report" (4RT 386:5-10 5RT 645; 6RT 1319.)

Martinez drove Janette home (6RT 1316-1317.) Janette told her mother what happened, but thoughtfully edited what she told her mother, carefully omitting all mention of the purported sexual assaults. (6RT 1317-1318.) She brushed her teeth and gargled. (9 RT 3400.) Obviously concerned that Taco Bell managers would believe Martinez and Janette were responsible for the theft, before they called police, they called the Taco Bell manager, but got no answer. Next, they called the assistant store manager, but still did not get an answer. (4RT 386-387;

Finally, they were able to reach the store's shift manager and explain what happened. (6RT 321.) After all this, the police were called (6RT 1321.) Far more than nine minutes had to have elapsed. And, by the time the police arrived, intervening discussions and events calmed any residual stress and fear (see 7-RT-1824.) In fact, immediately after the interview Janette was taken to the hospital for examination and described as cooperative and "very quiet and reserved" (9RT-3327.)

The court decided the statements were not excited utterances, but spontaneous statements made without time to reflect, consider, or fabricate. According to the Court Janette's statements to the officer qualified because she has "In a state of shock, scared to death, hysteral" and the passage of time and intervening event were not relevant (7RT 1831.) The officer testimony was admissible as a spontaneous statement, but not as a prior inconsistent statement. (7RT 1832.) The Court was mistaken because, as explained above, it was unreasonable to believe that Janette was still "under the stress of excitement" (See In re Daniel Z. (1992) 10 Cal. App. 4th 1009, 1022.)

C. Erroneous Admission of the hearsay Evidence was prejudicial

The jury has already heard Janette's testimony. The officer who interviewed Janette, over vigorous objections, was permitted to narrate from his report what Janette said, thus repeating essentially the same facts Janette testified about. (7RT 1839-1843.)

Detective Michelle Gonzalez also responded to Janette's

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home and interviewed her. Over hearsay and section 352 objection's the Court permitted Detective Gonzalez to recrate what Janette said to her, expanding on Janette's testimony and going sentence by sentence from her report. (7RT 1905-1914, 1916-1918.) The Court overruled the objection because everything Janette told officer Gonzalez were "spontaneous statement." (7RT 1920-1926.) The officer said that Janette said that her assailant was a short, chubby, dark haired Hispanic. (7RT 1927.) The officer continued to repeat what Janette purportedly told her (7RT 1927-1930.)

The Jury should not have heard Janette's tale over and again from the officers in the guise of spontaneous statements. Importantly, unlike the cases the prosecutor cited, there was no immediacy to Janette's statements to the officers. There were superseding intervening factors; time had passed. (7RT 1817-1819.) Still, through the officers the Jury heard anew everything Janette had already testified about- thus doubling and tripling the prejudicial effect of her testimony. (7RT 1839-1843.) Having heard the details from Janette, repetition of those details could have had no other effect than to inflame the passions of the Jury. That is prejudice.

Petitioner concedes that if this was the only error in this very lengthy trial, it would not be necessarily be so prejudicial as to constitute a due process violation and reversible error. But, it does so when considered in conjunction with the multiple error in this case. Accordingly as in Pearch, Petitioner Bautista's conviction of the Taco Bell offenses should be reversed for the erroneous admission of hearsay evidence in the guise of spontaneous statement since this prejudicial evidentiary error undoubtedly affected the Jury's deliberation on all Coun

Ground #5

THE VERDICTS IN COUNTS 8, 9, AND 10 THE EL POLLO LOCO INCIDENT, SHOULD BE REVERSED FOR INSUFFICIENT EVIDENCE.

There is insufficient evidence to support Petitioner Bautista's convictions of the counts related to the El Pollo Loco offenses.

A. Standard Review

"The proper test for determining a claim of insufficiency of the evidence in a criminal case is whether, on the entire record a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, [the reviewing Court] must view the evidence in the light most favorable to the people and must presume in support of the Judgment the evidence of every fact the trier could reasonably deduce from the evidence." People vs Jones (1990) 51 Cal. 3d. 294, 314; People vs Johnson (1980) 26 Cal. 3d 557, 577)

The evidence must be substantial; it is not enough for the respondent to point to some evidence (People vs Johnson, supra, 26 Cal 3d at p. 577) For evidence to be "substantial" it must be reasonable, credible, and of solid value (Id at p. 576.) The "evidence" may have been sufficient to connect Moran to the El Pollo Loco offenses, but the identifications of Petitioner were far to amorphous to constitute substantial evidence connecting him to the crimes.

B. BECAUSE THE EYEWITNES IDENTIFICATIONS WERE NOT CREDIBLE, APPELLANT'S CONVICTIONS SHOULD BE REVERED

It's now well established that eyewitness identification of strangers is extremely unreliable; "The vagaries of eyewitness identification are well Know; the annals of Criminal Law are rife with instances of mistaken identification." (United State vs Wade (1967) 388 U.S. 218, 288, 87 S. Ct. 1926, 18 L. Ed. 2d 1149.) As our Supreme Court has observed;

"There is great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation and this risk is increased when the observation was made at a time of stress or excitement.... [This] danger is inherent in every identification of this Kind... The problem is important because of all the evidence that may be presented to a Jury, a witness' in-Court statement that "he is the one" is probably the most dramatic and persuasive" People vs McDonald (1984) 37 Cal. 3d, 351, 363-364, [19] quoting United State vs Russell (6 Cir, 1976) 532 F.2d 1063, 1066.)

There were four witnesses who testified about the EL Pollo Loco burglary, Lauca, Black, Ivan, Estrada, Nancy Salangsang, and Martin Ocos,. Estrada was not able to identify anyone. (11RT 4571.) Black was able to indentify Moran from a photo six-pack (NO. 2 Position) and in court only as "someone who most resembled the man with the gun.

[19] Overruled on another point in People vs Mendoza (2000) 23 Cal. 4th 896, 914.

(11 RT 4226, 4289, 4295, 4301.) Black was unable to indentify Bautista in a lineup or in court (11 RT 4292-4294.)

Cross-racial indentifications are among the most unreliable. People vs McDonald, supra 37 Cal 3d at p 364 & fn 9.) Nancy Salangsang a Filipina woman who testified through a Tagalog interpreter, described the man who grabbed her, pressed a gun into her back, and pushed her into the Kitchen and thence into a back office, as neither fat nor thin (11 RT 4578 4580 12 RT 5108) Petitioner is a short Hispanic man. He is "heavy-set" and "fat" (5 RT 657-658.) Salangsang did not recognize anyone in a photo six pack containing Petitioner's picture or in a live lineup (12 RT 4842, 4863, 4823.) Nonetheless, in Court Salangsang purportedly identified Petitioner who is very heavy, as the "neither fat nor thin" man who grabbed her (11 RT 4578; 12 RT 4829.) The prosecutor did her best to confuse Salangsang and suggest to the Jury that she did identify Bautista before trial when she did not. (see 12 RT 4815 4824.) The court blithely overruled repeated objections that the prosecutor was twisting the truth and misleading the Jury. (12 RT 4817.)

In view of the vast difference in the description Salang-sang gave right after the Crime and Petitioner's actual appearance, her inability to pick him out of a photo array or live Lineup shortly after the Crimes, the prosecutor's unwillingness to accept the fact that salangsang did not indentify Petitioner before Trial, and Considering the unreliability of crossracial identification's, Salang-sang's in-court identification two years after the fact Lacks all Credibility.

That Leaves Martin Oros. After the robbery, Oros described one of the robbers as a white male 5'6" tall Clean shaven, and thin"[20] (12 RT 4511.) Again Petitioner Bautista is obviously "Hispanic and fat" neither "white" or "thin." In the prosecutor's direct examination she use so many exhibits numbers and asked so many misleading questions that Oros begame so hopelessly Confused it is virtually impossible to determine who he had indentify and when (12 RT 4505-4509.) In fact, Oros admitted he was Confused by which Lineup the prosecutor's asked about in her direct examination (12 RT 4522.) This makes his in-court indentification (12 RT 4504) of Bautista as the thin, white man who hit him in the face at El Pollo Loco unbelievable. Oros' indentification of Bautista is Lacking all reasonable, Credible, Solid value,

All of these witness were under extreme stress in a violent situation Controlled by at Least an man with a gun, psychological factors recognized as leading to misidentifications (People vs McDonald supra 37 Cal 3d at pp. 362, 375-376.) In addition, the indentification of strangers is highly suspect when no other evidence Connects the accused to the Crime (Id at pp. 362, 363.) In the instant Case, nothing - no fingerprints, no forensic of any Kind - Connected Petitioner to the El Pollo Loco burglary and robberies. Petitioner's Convictions of Counts 8, 9 and 10 should be reversed for want of sufficient evidence.

[20] Oros described the second man as a male Hispanic wearing a blue baseball Cap. He did not see this man face although he heard him speak spanish (12RT 4512) However, a blue Cap was identified as belonging to codefendant Moran,

Ground #6

INSTRUCTIONAL ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL AND DUE PROCESS

Court and Counsel argued and fought over jury instructions in marathon sessions held over seven days and continuing even after the jury began deliberating - with the prosecutor generally prevailing (2 CT 445, 450, 454, 458, 463, 466.) In the end there were atlease two serious instructional errors. The first was CALJIC No. 3.00/3.02,[21] a hybird instruction in which the prosecution grafted a portion of the natural probable consequences doctrine onto the aiding and abetting instruction, but failed to identify target offenses or which crimes were the unintended result of the target crimes. The second was not limiting CALJIC No. 2.06 to defendant Moran when it was his family members who allegedly threatened Janette A.[22] This error infected the conviction of both the Taco Bell charges and the El Pollo Loco charges.

[21] CALJIC No. 3.00 Provides:

"Persons who are involved in [committing] [or] [attempting to commit] a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively [commit] [or] [attempt to commit] the act constituting the crime, or [¶] 2. Those who aid and abet the [commission] [or] [attempted commission] of the crime.

CAL JIC No 3.02 Provides:

"One who aids and abets [another] in the commission of a crime [or crimes] is not only guilty of [that crime] [those crimes], but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime[s] originally aided and abetted.

"In order to find the defendant guilty of the crime[s] of [as charged in Count[s] ________] you must be satisfied beyond a reasonable doubt that:

"1 The crime [or crimes] of [was] [were] committed;

"2 That the defendant aided and abetted [that] [those crimes]

"3 That co-principal in that crime committed the [crime[s]] of and

"4 The crime[s] of [was] [were] a natural and probable consequence of the commission of the crime[s] of ____ "

A. Scope and Standard of Review

A trial court has a duty to instruct on the general principles of law relevant to the issues raised by the evidence, that is, those closely and openly connected with the facts before the court which are necessary for the jury's understanding of the case People vs Sedeno (1974) 10 Cal 3d. 703, 715,[23] quoting People vs St. Martin (1970) 1 Cal. 3d. 524, 531.) A criminal defendant is entitled to accurate jury instructions. (see, e.g., People vs Le Carno (2003) 109 Cal. App. 4th 1058, 1070. [reversing conviction because of erroneous instruction].)

[22] CALJIC NO. 2.06, instructs:

"If you find that a defendant attempted to suppress evidence against [himself] [herself] in any manner, such as [by the intimidation of a witness] [by an offer to Compensate a witness] [by destroying evidence] [by Concealing evidence] [by], this attempt may be considered by you as a Circumstance tending to show a Consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

[23] Overruled on another point in People vs Blakeley (2000) 23 Cal 4th 82, 89.

In reviewing a claim of instructional error, the Court Considers the Jury instructions as a whole in the Context of the Charge and the entire trial record [redacted] (People vs Haskett (1990) 52 Cal. 3d. 210, 235.) An inaccurate or misleading instruction is grounds for serversal when it Cannot be said that the instruction was harmless beyond a reasonable doubt. People v Lee (1987) 43 Cal 3d 666, 676, Chapman vs California, supra, 386 U.S. at p. 24.

B. NO PART OF CALJIC NO. 3.02 should have Been Crafted onto NO 3.00 Because the Prosecution's Theory was that both Defendants were Principals

This is the instructions the Court gave over multiple objections:

"One who aids and abets another in the commission of a crime is not only guilty of that crime but is also guilty of any other crime committed by the principal, which is a natural and probable consequence of the crime originally aided and abetted."

"whether a consequence is natural and probable is an objective test based, not on what the defendant actually intended, but what a person of reasonable and ordinary prudence would have expected would be likely to occur."

"The issue is to be decided in light of all of the circumstances surrounding the incident."

"A 'natural consequence' is one which is within the normal range of outcome that may be reasonably expected to occur if nothing unusual has intervened.

"'Probable' means likely to happen." (17 RT 8720-8721.)[24]

We start with the basic principal that accomplice instructions should not be given when the defendant is charged as a principal. People vs Prettyman (1996) 14 Cal. 4th 248, 268-269 [instruction should not been given when prosecution has not elected to rely on that particular theory of accomplice liability] People vs Brown supra 31 Cal

14th at p 559) As this Court has observed:

"The Trial should grant a prosecutor's request that the Jury be instructed on the natural and probable Consequences' rule only when (1) the record Contains substantial evidence that the defendant intended to encourage or assist a Confederate in Committing a Target offense, and (2) The Jury Could reasonably find that the Crime actually Committed by the defendant's Confederate was a 'natural and probable Consequence' of the specifically Contemplated target offense. If this test is not satisfied, an instruction should not be given, even if specifically requested" People vs Gonzalez (2002) 99 Cal. App. 4th 475, 485, quoting People vs Dawson (1997) 60 Cal. App. 4th 534, 544, emphasis added.)

[24] This version of No. 300 was not on the original packet of instructions given to the Jury. The Court read the instructions to the Jurors and provided them with a hard Copy (17RT 8221) but a hard copy did not make it into the Clerk's Transcript.

The test was not satisfied here. Throughout the Trial the prosecutor insisted that each defendant was a principal- not an aider and abettor- in the alleged Crimes. Aiding and abetting instructions should not have been given at all. A botched version of CALJIC No. 3.00 which incorpated some, but not all elements of the natural and probable

Consequence doctine should neve have been given either.

I. Instruction No. 300 was defective because the Court never defined the target Crimes.

In People vs Prettyman, supra, 14 Cal. 4th 248, the Court held that when a trial Court instructs on the "Natural and probable Consequences" doctrine, the court must identify and describe the target Crimes Contemplated by the defendant. Otherwise, there is a risk that the Jury will "indulge in unguided speculation." (Id at p. 272) It is error to give the instruction without expressly defining any target offenses. People vs Sakarias (2000) 22 Cal. 4th 596, 627-628.)

Appellant has preserved the error for appellate review. Court and Counsel engaged in lengthy discussions as to whether the Court should accede to the prosecutor's request for CALJIC No 3.02 on natural and probable Consequences should be given. (3 CT 529; 14 RT 6307; 16 RT 7558-7576.) The Court decided not to give it because.

"The way it's presently worded is more Confusing to the members of the Jury than not, [and] it does not help the Jury to give 3.02. ... if we Can't ourselves agree it makes absolutely no sense to give it to the Jury who have not been trained in Legal analysis and would be further Confused, would send questions out, no doubt trying to get a handle on what 3.02 says [¶] And to me, this case is not all that difficult from a Legal analysis, I Just don't see any point in giving them 3.02 (16 RT 2566; 3CT 529)

After the Court ruled that No. 3.02 would not be given because "it would confuse this Jury" the prosecutor withdrew the instruction. (16 RT 2576-2577) The next day the prosecutor submitted a new instruction which appended one Concept from No. 3.02 onto No. 300:

"One who aids and abets another in the Commission of a Crime, is not only guilty of that Crime, but is also guilty of any other Crime Committed by the principal, which is a natural and probable Consequence of the Crime originally aided and abetted." (17 RT 8440.)

Appellant objected and move for a mistrial because "natural and probable" was not defined. The prosecutor's instruction did not explain to the Jury what a target Crime is or which crimes this newly-submitted instruction involved. 15 RT 8114-8118.)

"I can see the Jury Looking at this and saying, well, we can Convict Bautista for a Crime because he aided and abetted, Mr. Moran, when the intention of this instruction when given originally was how would this conduct of Mr Bautista affect Mr Moran"
(16 RT 8117:-20-24.)

"This just gives a blank three-line statement of the law which may or not be accurate. But it doesn't explain natural and probable consequence as 3.02 did. (7M The Court said, well 3.02 is too confusing for us; so, therefore it will be too confusing for the jury. So, to give them this three line paragraph and not define this concept for them is grossly misleading" (16 RT 8118: 1-7.)

The Court overruled the objection and denied the motion for mistrial (16 RT 8116, 8118; 17 RT 8403.) The Court was "not convinced that it would be... reversible error or so prejudicial that it would be a denial of due process" to give the prosecutor's instruction. (17 RT 8445.)

After the court ruled it would give the prosecutor's requested instruction, the cour invited counsel to submit his own instruction if he was unhappy with the prosecutor's submission (16 RT 8119.) But, when counsel examined the packet of "final" instructions the court assembled for the jury, the offending natural and probable consequence language had been deleted from No. 3.00. This led counsel to believe that the Court reconsidered and struck that language (17 RT 8441, 8443-8444).

However, when reading the instruction to the jury, the Court gave the prosecutor's modified version of No. 3.00. This immediately brought the attorneys to their feet. They learned that the "final" packet the Court provided to them and the jurors did not match the court's packet because neither the defense attorneys nor the Jurors had the prosecutor's No. 3.00. Appellant renewed his objection. (12RT 8441) The Court then advised the Jurors it would give them the modified version of No. 3.00 thus calling specific attention to that instruction above all others. (12RT 8440-8443.) Counsel ask the Court not to further highlight No. 3.00 until the Court heard further argument on the instruction. (12RT 8486.)

Appellant objected anew. The borrowed sentence is part of a more Complete Instruction which was not clear. There are parts of No. 3.02 that are necessary for the Jury's understanding including the definition of natural and probable Consequences and target offenses. (12RT 8447) Appellant asked that further language from No. 3.02 defining the phrase "Natural and probable Consequences" be added to No. 3.00 (12RT 8208 8209.) Appellant concluded, "I don't think the sentence [the prosecutor inserted from No. 3.02] should be added. But if the Court is bent on adding it define it" (12RT 8209:25-28.) In doing so however, appellant expressly preserved his objection to the grafting of some language from 3.02 onto 3.00 (12RT 8214.) The Court decided to give the remodification. (12RT 8211.)

The natural and probable consequences doctrine is triggered when the perpetrator ultimately Commits some different or additional Crime than the intended offense (People vs Culuko (2000) 78 Cal. App. 4th 307, 322.) Thus "identification of the target Crime will facilitate the Jury's task of determining whether the charged crime allegedly committed by the aider and abettor's confederate was indeed a natural and probable consequence of any uncharged target crime that the prosecution contends the defendant knowingly and intentionally aided and abetted." People vs Prettyman, Supra, 14 Cal 4th at p.267)

The biggest flaw in the hybrid instruction was that neither the target crimes nor the crime that was the natural and probable consequence of the target crime were neither identified although the erroneous instruction affected nearly half of the charges, Counts 1, 2, 6, 7, 11, Contrary to the prosecution's contention, descriptions of the charged offenses in the Jury instruction cannot suffice for identification of target crimes which in turn led to some other crime (19RT 11417.) As noted above, the failure to identify and define target crimes renders the instruction erroneous. (People vs Sakarias, Supra, 22 Cal. 4th at pp. 627-628; see also People vs Hickles (1997) 56 Cal. App 4th 1183-1193-1195) [failure to identify target crimes is prejudicial error.]; People vs Mouton (1993) 15 Cal. App. 4th 1313, 1315 [same]. [25]

2. MODIFIED INSTRUCTION NO. 3.00 GENERATED IRREPARABLE PREJUDICE,

In Prettyman, the court found the failure to indentify a target crime was harmless beyond a reasonable doubt because there was only one potential target crime shown by the evidence, assault with a deadly weapon which led to the natural and probable Consequence of murder. (People vs Prettyman, supra, 14 Cal. 4th at p. 267.) In sharp Contrast, in (People vs Hickles, supra 56 Cal. App. 4th 1183, the evidence would have supported a number of different factual scenarios. In reversing the Conviction, the court observed:

Overruled on another point in (People vs Prettyman, supra 14 Cal. 4th at p. 238.)

"While it is clear not all of those scenarios would support a natural and probable Consequences finding as a matter of Law, it is not obvious a Jury of Laypersons, lacking instruction on target offenses, would not have viewed murder as a natural and probable Consequence of a simple assault or even an argument, perhaps on a generalized view that things Can get out of hand in such altercations" (Id. at pp. 1197-1198.)

Assuming the instruction should have been given at all there are multiple scenarios here, too. There were 11 Counts against each defendant, susceptible to varying mixing and matching of target and unintended offenses. It is impossible to Know what the Jury did with the incomplete instruction. It is reasonably Likely, however, that the Jury packaged one or more of the robbery and burglary offenses as the unintended Consequence of a Kidnap for rape. In the alternative the Jury could have decided that the sexual offenses were the unintended Consequence of Kidnap for robbery.

I sum, the instruction is woefully incomplete. It did not identify the target offense, did not set forth the idea of a further crime being a natural and probable consequence of the target offense, did not define natural and probable consequences as being an objective test, not a subjective test. It allowed the Jury to think that natural and probable consequences meant that if you engage in an intent to commit a burglary, anything thereafter that happens is the natural and probable consequence of being a criminal. It was that broad. It was that ill-defined. The defective instruction left the jury rudderless.

Petitioner convictions should be reversed because it cannot be said beyond a reasonable doubt that erroneous instruction NO. 3.00 was harmless beyond a reasonable doubt. (People vs Hickles, supra, 56 Cal. App. 4th at p. 1198; People vs Giardino (2000) 82 Cal App. 4th 454, 470, 471 [failure to define required element not harmless error.]; People vs LeCorno, supra, 109 Cal. App. 4th at p. 1070 [failure to define "Knowledge" not harmless beyond a reasonable doubt]).

C. THE TRIAL COURT ERRED IN NOT LIMITING CALJIC NO. 2.06 TO CODEFENDANT MORAN BECAUSE IT WAS HIS FAMILY WHO ALLEGEDLY THREATENED PROSECUTION WITNESS JANETTE A.

A member or member of codefendant Moran's family allegedly threatened prosecution witness Janette A. if she testified. Over Moran's objections, the court instructed with CALJIC

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No 2.06 on witness intimidation, but did not limit the instruction to Codefendant Moran. This was error because the instruction should never have been given in the first instance. Moreover, petitioner Bautista was just an unrelated taxi driver (2 CT 287). There was no evidence he was related to Moran's extended family, or that he played any role in the alleged threats.

1. CALJIC NO. 2.06 should not have been given

Codefendant Moran objected at the length to this instruction because there was no evidence he had anything to do with the alleged threats to Janette and directed the court's attention to People vs Williams (1997) 16 Cal. 4th 153.[26] (13 RT 5727-5732; 14 RT 6358-6360.)[27]

THE COURT INSTRUCTED:

If you find that an effort to suppress evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt, unless you also find that the defendant authorized that effort.

"If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt and it's [sic] weight and significance, if any, are for you to decide (17 RT 8426-8427.)

26 Cert den (1998) 522 U.S. 1150, 118 S. Ct 1169, 140 L.Ed.2d. 179.

27 Appellant Bautista did not object to the instruction or ask that it be limited to Meran. Bautista seeks appellate review pursuant to section 1259 which provides for review despite the absence of an objection where as here, the "substantial rights" of the defendant are affected. 2.06 error reviewed under section 1259].)

In Williams, the Court reiterated the rule that a witness intimidation instruction should not be given in the absence of evidence that the defendant authorized the threat:

"Generally, evidence of the attempt of third person to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant." (People vs Williams supra, 16 Cal. 4th at p. 200,) quoting (People vs Hannon, supra, 19 Cal. 3d. at p. 599.) internal punctuation and Citation ommitted.)

Proof of a Criminal defendant's 'mere opportunity' to authorize a third person to attempt to influence a witness has no value as circumstantial evidence' that the defendant did so' (People vs Williams, supra, 16 Cal 4th at p. 200) quoting People vs Terry (1962) 57 Cal. 2d 538 566.) In People vs Hannon, supra, 19 Cal 3d at p. 599, the Court held it was reversible error to instruct with No. 2.06 because the evidence failed "to supply the necessary nexus between defendant and the alleged suppression of evidence" In People vs. Terry supra, 57 Cal.2d 538, the Court held that Circumstantial evidence in the form of personal relationships do not establish that the defendant himself authorized an attempt to suppress evidence. Because of the instructional error on this point during the penalty phase, the Court reversed the death sentence. (Id. at pp. 565-566.)

The instruction on the instant case rests of the circumstantial evidence of Moran's familial and personal relationships. Janette's friend and neighbor, Karla Campos, is the girlfriend of Guillermino "Meno" Sandoval, the third man involved in the robberies (5RT 984, 1005, 1031; 2CT 283.) Janette also Knows Lidia Batres, Meno's sister, and their brother, Carlos. Another of Janette's friends is Karina, whose boyfriend is Carlos (5RT 985, 1013, 1031.) Codefendant Moran was related to Janette's friends, although she denied Knowing this (6RT 1234-1235.) see also 13RT 5231.

Two weeks before the Taco Bell burglary, Lidia Batres called Janette and threatened her, "Take Care of your back." But maybe it was not Ms Batres calling (Compare 5RT 1018, 1022, with 6RT 1240.) Janette reported the threat to the investigating officer. (5RT 1023-1049.) Two weeks after the Taco Bell incident, Meno called Janette's mother and told her to stop Janette from making accusations about a robbery. (5RT-1024.) Another threatening Call Came from Bates (5RT-1024-1025.)

These extended family and interpersonal relationships are the only nexus between Moran and the alleged threat. The evidence fall far short of that required by Williams, Hannon and Terry. The instruction should not have been given at all. In the alternative, the Court should have Limited the instruction to Moran.

2. BY NOT LIMITING THE INSTRUCTION TO MORAN, THE COURT INVITED THE JURY TO SPECULATE THAT APPELLANT BAUTISTA WAS IN ON THE THREATS

Evidence Code section 355 provides, "When evidence is addmissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the Court upon request shall restrict the evidence to its proper scope and instruct the Jury accordingly." Hence appellant was entitled to have CalJIC NO. 2.06 Limited to Codefendant Moran. (People vs Perry (1972) 7 Cal 3d 756, 787-788)

In Perry, defendant Redman argued that the Trial Court erred in failing to instruct the Jury that evidence discovered in Perry's car was admissibly only against Perry and solely for the purpose of establishing flight. The Court agreed Redman was entitled to the instruction, but rejecte the claim because Redman had not asked for a limiting instruction. (Ibid.) However, the opinion does not address review under section 1259, or ineffective assistance of Counsel for not seeking a limiting instruction. Cases are not authority for propositions not Considered. (People vs Saunders (1993) 5 Cal. 4th 580, 592, fn. 8.) In the instant Case, appellant Bautista seek review and reversal under section 1259 because his substantial rights are at issue. (See discussion at p. 80 fn 27, supra.) In the alternative, his Conviction should be reversed for ineffective assistance of Counsel because a reasonably Competent attorney would have asked that CALJIC NO. 2.06 be limited to Codefendant Moran. (See discussion at pp. 35-36 supra.)

Because the jury was not instructed that the alleged threats to Janette had nothing to do with Bautista, the jury was free to speculate that if Bautista was being tried with Moran, he must have been part and parcel of the threats. Therefore, it Cannot be said beyond a reasonable doubt that this instructional did not error contribute to the verdict.

D. Appellant BAUTISTA's CONVICTIONS SHOULD BE REVERSED FOR PREJUDICIAL INSTRUCTIONAL ERRORS.

It Cannot be seriously disputed that hybrid instruction number 3.00/3.02, was grossly defective. This instruction Could only have led to rampant speculation among the Jurors. Not Can it be seriously argued that CALJIC No. 2.06, if given at all should have been limited to Codefendant Moran because it was his family members who purportedly delivered the threats to Janette. This instruction undoubtedly misled the Jurors into believing they could include appellant Bautista as one of the persons directing the intimidation of Janette and from that draw an inference of guilt.

For all of the reasons given in this section, the trial Courts' error Cannot survive (Chapman) review because the record dose not demonstrate "beyond a reasonable doubt that the error Complained of did not Contribute to the verdict obtained" (People vs Jensen (2003) 114 Cal. App. 4th 224, 239, quoting People vs Harris (1994) 9 Cal. 4th 407, 424.) Appellant's Convictions on all Counts should be reversed for instructional error. (Chapman vs California supra, 386 U.S. at p. 24.)

Ground #7

CUMULATIVE ERROR IN THIS CLOSE CASE DEPRIVED APPELLANT OF A FAIR TRIAL AND CONSTITUTED A MISCARRIAGE OF JUSTICE

Should this Court decide the verdicts on Counts 8, 9, and 10 are supported by substantial evidence, the Judgment of Conviction on all Counts connected to both sets of offenses nonetheless should be reversed for cumulative error. The Trial was fraught with prejudicial errors, including multiple incidents of prosecutorial misconduct which started during voir dire and did not stop until the prosecutor got in the final and false word during her closing argument.

A. THE MANY ERRORS CREATED IRREPARABLE PREJUDICE

The occurrence of many errors which, if considered separately might not be deemed seriously prejudicial are a ground for reversal in a close case. The cumulative effect of multiple errors is sufficient to warrant the conclusion that the Trial was unfair and hence a miscarriage of Justice occurred. (People vs Hill supra, 17 Cal 4th at p. 844.) In Hill, Trial errors included prosecutorial misconduct and instructional error with respect to intent to Kill. The Court held that the number of instances of prosecutorial misconduct considered with other errors created a negative effect that made overall unfairness greater than the sum of individual errors and required reversal. (Id at pp. 844, 847.)

In People vs Cuccia (2002) 97 Cal App 4th 785, 795, reversal was required where there was a reasonable probability the Jury would have reached a more favorable verdict but for the Errors in People vs Hernandez (2003) 30 Cal.

4th 835, 877, the errors as the penalty phase of a capital case were numereours and serious, leading to the reasonable possibility that, considered together, they affected the Jury's penalty determination. The Court reversed the Judgment of death.

As in Hill, Cuccia, and Hernandez, the errors in the instant case were numerous and serious. It's reasonably certain appellant would have obtained a better result from a properly instructed Jury, unswayed by the prosecutor's improper and misleading use of Bautista's statement.

B. REVERSAL IS REQUIRED BECAUSE THIS WAS A CLOSE CASE WHERE THE PREJUDICIAL ERRORS HAD A DEVASTATING EFFECT ON APPELLANT's CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The general rules is that in a close case i.e., one in which the evidence is evenly balanced or sharply conflicting, a lesser showing of errors Justifies reversal. (6 Witkin & Epstein, Cal. Crim. Law, supra, reversible Error § 45, pp. 506-508 [Collecting Cases.]) "The close case theory is also applied where there is no dispute in the testimony, but the inferences from it are Conflicting" (Id at p. 508, emphasis in original see People v Moore (1954) 43 Cal. 2d. 517, 530.)

Although not dispositive, Lengthy Jury deliberations also is evidence the case was close. "The fact that the Jury deliberated almost 22 hours over 5 days practically compels the conclusion" the case was close. (In re Martin (1987) 44 Cal.3d 1, 51; but see People V Walker (1995) 31 Cal.App.4th 432, 439, [lengthy deliberations could be reconciled with Jury's conscientious performance of its duty rather than difficulty in reaching decision].)

Jurors questions and requests to have testimony reread are indications the deliberations were close. People Vs Pearch supra, 229, Cal.App.3d, at p. 1295; Maupin vs widling (1987) 129 Cal.App.3d 567, 572, 573; People vs Fuentes (1986) 183 Cal.App.3d 444, 456.)

At the onset of deliberations on May 13-2002 the Jury sent this question:

"Are Counts #6 and #7 the same? Why are they 14 Counts as mentioned on page 8. Should it be 12 Counts"? (2CT 491; 17RT 8772.)

Appellant asked the court to simply answer "No" and refer the Jurors to the last page of the information which reflects the two dismissed Counts. (17RT 8774-8775.) Appellant objected to the Court's further instruction of the Jury (17RT 8778.) The court responded to the Jury questions;

"No, They're two separate robberies pled [90] If you have further difficuly with that, I know myself where the problem is, so if you have further difficuly with it... the Court will advise you further if you need further instruction." (18RT-9004.)

As to the question relating to the number of Counts the Court explained:

what happened was you'll recalled after the people Close their case... I told you there was a motion that the Court had to hear outside the presence of the Jury. [91] As a result of the evidence presented during the people's case in Chief... the court dismissed Count 12 and 13... and therefore, that reduced the number of counts from 14 to 12" (18RT-9004-9005.)

The next day the Jury asked for:

"① Re-reading from Pedro's testimony[,] the section regarding the ATM receipt and phone call from Bautista and Moran regarding going to the ATM.

"② We have designated Count 6 as the $10.00 and Count 7 as the $300.00 Is this acceptable?"

"③ In Count 6 and 7 Can we separate the defendants or find both guilty or not guilty? [B]ecause both are mentioned in the Count?

"④ We still need verdict forms and master Copy of Counts (2CT 498-499, 18RT 9026-9028)

The Court directed the reporter to read back the requested testimony. (2CT 505; 18RT 9045-9047.) The court informed the Jury it could acquit both, convict both or acquit one and convict the other. (18RT 9032.) The court explained that the "Clean" Copy of the information provided to the Jury was the "Master Copy" (18RT 9032-9034.)

As to question No. 2, the court intended to instruct the Jurors on the prosecutor's theories regarding these counts[28] but instead simply referred the Jurors to instruction No. 12.02 so as not to invade the province of the Jury. (18RT 9048, 9068.) However, it was clear from their question that the Jury was under the impression that one of the robbery counts was robbery of the $300 from the ATM. That robbery was not charged. Rather, count 6 was the robbery of $1100 from Pedro Martinez's wallet and count 7 was the robbery from his constructive possession of the money in the Taco Bell cash drawers.

Appellate asked the court to instruct the Jury that the people were not prosecuting appellant for the robbery based on the robbery of the ATM. (18RT 9059.) Counsel stated, "I think they do need to be told what the people's theory is as to those two robberies". (18RT 9061:3-4.) This was so because all along the prosecutor insisted the two robberies

[28] The Court annotated the Jury's question from thus: "14 counts - 12 counts and 13 were dismissed by ct, at the end of π"s case.

NO: Taco Bell money.
"$ in Martinez wallet." (2CT 491.)

were the $10.00 and the $225 taken from the register at Taco Bell. Half the Jurors could convict on count 7 based upon the $300 taken from the ATM and the other half based on the money taken from the cash registers (18RT 9062-9064.) The Court reversed its position and decided to tell the Jurors that Count 6 referred to the $10.00 and Count 7 referred to robbery of the cash registers at Taco Bell, and so informed the Jury. (18RT 9020, 9304, 9307, 9308.) By now of course, the Jury had been deliberating for two days under a false assumption.

The Court still had not given the verdict forms to the Jury at the end of the second full day of deliberations. (See 18RT 9023.) Finally at the beginning of the third day's deliberations the Court provided the verdict forms. (18RT 9303.) The Jury deliberated all of the third and fourth days May 20, 21, and reached a verdict at the end of the fifth day, P. May 22. (18RT 9901, 10501.)

The combination of Jury confusion over the counts and the Court's indecision and lack of preparation, in conjunction with the Jury questions and requests for rereading of testimony, demonstrates profound Juror confusion and reflects a very close case. Accordingly, serious errors at trial and chaotic deliberations cast severe doubt on whether appellant Bautista obtained a fair Trial. His Conviction should be reversed.

ARGUMENT

Appeal from the post-Judgment Restitution Order No. B124565

Ground #8

THE TRIAL COURT ERRED IN IMPOSING A $41,000 RESTITUTION FINE BECAUSE THIS SUM FAR EXCEEDED THE VICTIM'S ACTUAL NET LOSS

Pedro Martinez had been compensated through the Workers' Compensation Act and the United State Unemployment fund for most of the damages he suffered as a result of the Crimes. (RT 5-10-14-16-17.) Nonetheless the Court ordered appellants Jointly and severally to pay restitution in the amount of $41,094.34, and directed Martinez to use the restitution money to reimburse the workers' Compensation insurer (Gallagher Bassett) for sum expended on his behalf. (RT 29 CT 92) This was error because it amounted to an end run around the principle established in People vs Birkett (1999) 21 Cal 4th 226, that restitution dollars do not go to insurers, result in a doble recovery, and deprived appellant of his Eighth Amendment right to be free from cruel and unusual Punishment. (RT 25.)

A. STANDARD OF REVIEW

This issue requires construction of section 1202.4, subdivision (F). Construction of a statute is reviewed de novo, with the aim of implementing the intent of the legislature or, in this case, the intent of the people who voted for Proposition 8. (Eg., People vs Kennedy (2001) 91 Cal. App. 4th 288, 291.)

In Proposition 8 the people expressed an unequivocal intention that "all persons who suffer losses as a result of criminals. (Cal Const., art I §28 Subd, (b).) This measure requires restitution to direct victims who have suffered actual losses. (People vs Birkett, supra, 21 Cal. 4th, at p. 244.) Penal Code section 1202.4 subdivision (F) implements that measure. It provides:

"In every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record." 29

29 The prosecution relied on Gov. Code section 13967 as the basis

for awarding restitution to the victim. (CT 66.) However, that section was repealed long before the restitution hearing. (Stats. 2002, ch. 1141 § 10.)

B. REQUIRING DEFENDANT TO PAY RESTITUTION AS A PASS-THROUGH TO THE WORKERS' COMPENSATION INSURER VIOLATES THE PLAIN LANGUAGE OF § 1202.4

In People vs Birkett, supra, 24 Cal 4th 226, the defendant purchased private insurance. The trial court diverted part of the restitution award to reimburse private insurers and the Court of Appeal affirmed the order. Our Supreme Court reversed holding that insurers are not "direct victims" as envisioned by the plain language of [then] section 1202.4 which governed restitution to be made by probationers to "direct victims" (Id at p. 244.) Birkett Court further observed that the line between probationers and incarcerated person no longer exists. (Id at p 247 fn 21.) Therefore the rule in all cases, probation and non-probation, is that the insurer is not entitled to recoup benefits through section 1202.4[30] yet, the Court allowed exactly that when it ordered Martinez to deal with the workers' Compensation Board in reimbursing it from sums obtained from defendants (RT 29.

This is what happened. Dr Nehoracyan treated Martinez from September 2001 to April 2003 for psychological injuries suffered as a result of the kidnap and robbery at Taco Bell. (RT 4, 13.) The

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We note this is not a case like People vs O'Casey (2001) 88 Cal App 4th 967, a fraud case where the workers' Compensation insurer itself was the direct victim of the Criminal act and entitled to restitution. (See also People v Moloy (2000) 84 Cal. App. 4th 257 [direct restitution to insurers properly ordered upon Conviction of Conspiracy to present false and fraudulent Claim to those insurers].)

Prosecution sought restitution of $10,160.25 + $4,934.44 for medical benefits paid by the worker's Compensation insurer attorney fees of $8,250 to pursue a permanent disability award of $55,000, $26,000 in Lost wages and Costs for six more months of psychiatric care even though Martinez was now working and no Longer seeing Dr Nehorayan. (RT 20-21-25-26.)

The Court awarded $10,160 for doctor's Care $4,934.34 for medication and $26,000 for Lost wages, for a total of $41,094.34. The Courts instructed Martinez

"[W]hen you receive... restitution, you're going to have to work out with them [The worker's Compensation Board] what they need to be reimbursed for and that's something that you Can't forget to do, okay?" (RT 29-17-22.)

A Trial Court Should not permitted to make an end run around the plain Language of section 1202.4 by ordering reimbursement to the worker's Compensation insurer through the direct victim. A Trial Court should not by judicial fiat decide that doing so is an appropriate exercise of the court's power. (Cf. In re Kenneth H. (1983) 33 Cal 3d 616 621.) The order imposing restitution to Martinez so he can in turn reimburse the worker's Compensation insurer should be reversed.

C. IMPOSING A RESTITUTION AWARD ATOP THE WORKER'S COMPENSATION BENEFITS GIVES MARTINEZ A DOUBLE RECOVERY

Under Birkett, the order requiring Martinez to reimburse the worker's Compensation Carrier from restitution proceeds Cannot stand as a matter of Law. The award should also be vacated to avoid double recovery-it exceeds Martinez' net Loss because he already has been Compensated for all of his medical Loss and most of his Loss wages by the worker's Compensation insurance carrier.

Appellant objected to restitution in the full amount of medical benefits because these were benefits to Mr Martinez, not Loss, and he bore no Liability for those Costs. In addition, Martinez received a $55,000 award for permanent disability from the worker's Compensation Board. Appellant objected to making Lost wages the State Paid Martinez as unemployment benefits an element of restitution because that, too, would Constitute double dipping (RT5-10;-14;-16-17.)

This is not a situation like that in Birkett where the victim insured himself against loss and paid the insurance premiums (People vs Birkett supra 21 Cal.4th, at p.247.) As the Court observed, "[T]here is no great novelty in the notion that a person injured or damaged by the wrongful conduct of another even after partial or full reimbursement from an independent source" (Id at p. 142 fn. 19.) The rationale supporting the collateral source doctrine is that a victim should not be penalized because he or she "had the thrift and prescience to purchase insurance and the investment represented by the victim's payment of insurance premiums would earn to benefit if they served to mitigate his tort damages" (Ibid) But, the victim does not reap a double recovery. Typically the insurer assets a lien against any recovery in tort. (Ibid.)

In sharp contrast, worker's compensation insurance is not something the injured employee has bought and paid for, and benefits are not triggered by wrongfull conduct. Rather, pursuant to State Constitutional mandate, the California worker's Compensation Act provides for a compulsory scheme of employer no fault liability for injuries arising out of the course of employment. (Cal. Const, art. XIV, §4.) The purpose of the Act is to provide coverage for medical surgical, hospital, and other remedial treatment as a requisite to relieve the damaging effects of an on-the-job injury. (Fitzparick vs Fidelity & Casualty Co. (1936) 7 Cal.2d 230, 233.) An employee who sustains a work related injury is limited

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to recovery under the worker's Compensation system (Lab. Code § 3600.) Under this exclusivity rule, the injured worker obtain relatively swift and certain benefits without having to prove fault. In exchange, the employee give up the wider range of tort remedies. (Torres vs Parkhouse Tire Service, Inc, (2001) 26 Cal 4th 995, 1001.) Courts "must be vigilant to preserve the spirit of the act and to prevent a distortion of its purposes" (Scott vs Pacific Coast Borax Co, (1956) 140 Cal. App 2d 123, 128.) Just as an injured employee give up tort remedies in exchange for workers Compensation benefits for which he paid no premiums he should be deemed to give up restitution fines which otherwise effectively provide a double recovery. As counsel explained, because of the worker's Compensation Act Martinez suffered no net Loss generated by medical expenses. Rather, he received a benefit Conferred by the worker's Compensation system, and that is not the same as incurring an actual Loss and being made whole for that Loss (RT 15-17.) Put another way, ordering the defendants to Compensate Martinez for a benefit he has already recieved doubles that benefit. That is unfair and unjust It distorts the goal of the restitution statute that real Losses be address through restitution.

D. THE $26,000 AWARD FOR LOST WAGES SHOULD BE REDUCED TO $11,880 THE AMOUNT OF MARTINEZ ACTUAL LOST WAGES

The $55,000 award for permanent disability takes into effect that Martinez will not be a wage earner like he was before. (RT 14.) Putting that aside, Appellant Conceded that Martinez' temporary disability payments through worker's Compensation did not Compensate him for the full amount of his lost wages for the relevant period from July 1-2001 to March 31-2003 or 33 months. (RT 8.) The difference between what he would have earned was $360 per month, or $11,880 over 33 months. (RT 10.) yet, the prosecutor calculated the wages loss without any regard to offset (RT 21) and the Court awarded $26,000--more than double Martinez' actual Loss. Again this is unjust and unfair, and abhorrent to the rationale behind the restitution statute that it is true losses that are to be Compensated. If the restitution fine is upheld at all, it should be reduced to $11,880 so that Martinez' compensation is limited to his actual lost wages.

E. THE RESTITUTION FINE SHOULD BE REVERSED BECAUSE IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT OF APPELLANT AND HIS FAMILY

The Eighth Amendment of the Federal Constitution prohibits Cruel and Unusual punishment. The defense objected to the restitution fine on the Eighth Amendment grounds. This was not a good faith attempt at restitution. Instead, the real purpose of the fine was to impose additional punishment under the guise of restitution. It was cruel and Unusual Punishment became the defendant would never see a dime in the off chance they ever get out of prison to do any work. The

Prosecutor "Just wants to get a pound of flesh and another pint of blood" (RT 25.) Moreover, sums family members provides for some small comfort in prison will be subject to the restitution order. (RT 26

In sum, given the fact that Martinez' true economic loss was approximately $11,880 it was misuse and distortion of the restitution laws to impose a $41,000 order for restitution. Appellant asks that the order be vacated in its entirety or, in the alternative, that a new order be entered limiting the restitution amount to $11,880.

For the reasons given herein, Appellant requests that his conviction be reversed on all counts. In the alternative, the restitution fine should be reversed or reduce to $11,880

ELMER R. BAUTISTA Police Report

Mr Bautista gave the following Statements

(1)

Mr Bautista is a taxi driver by profession. On Friday night June 29-2001. Two friends namely "Paco and Meno" asked Bautista if he had any plans for the following Sunday night July 1-2001. Bautista told Paco and Meno that he would be available on the night in question Paco and Meno. Then told Bautista that they wanted him to drive them to Glendale on Sunday night.

(2)

As previously agreed upon Bautista drove Paco and Meno to Glendale that following Sunday night Bautista drove his Chev, Caprice, Bautista was directed to a "Taco Bell Restaurant" Bautista parked on the street South of Taco Bell Meno then ask Bautista if he wanted to make some money. Bautista inquired how the money would be maded? "Meno" replied that he was a friend of a "feMale employee Janette" at Taco Bell who was going to give him money. Bautista warned Meno that he would tell the police everything if the money was obtained illegally Meno got out of Bautista Caprice and entered a "Gray Honda Accord parked on a side street near a Taco Bell

(3)

Thereafter Bautista saw "Paco" slash the Tires of a Car park in the Taco Bell parking Lot. Bautista and Paco Later followed the Same Car to a parking Lot in a shopping

Center Close to Taco Bell "Janette" and a male employee of ~~Taco Bell occupied the Car at the shopping Center~~ parking Lot the male and Janette repaired the slashed tire that was Cause by Paco.

(4)

Bautista approached the male and Janette and as instructed by Paco he was told to move their Car to a side street near the shopping Center Janette was inside the Car when Bautista was ask to move it from the shopping Center to the side street Meno was now also parked on the same side street near the shopping Center in his Honda Accord

(5)

Bautista then drove the male to the Taco Bell and to the Bank of America in his Chev Caprice. Upon Bautista return with the male from Taco Bell and the Bank Paco was still in the Car with Janette Bautista saw that Janette was crying and this angered him (Bautista)

(6)

I asked Bautista if he recalled being stopped by a police officer while he had the Taco Bell employee in his Caprice? Bautista recalled the incident saying that the officer stopped him because the License plate on the back of his Car was not showing. Bautista said that he gassed up the Car somewhere on Broadway after arriving at Taco Bell and probably forgot to flip the License plate up after gassing up.

(7)

Bautista denied that he was armed with a handgun during the robbery and said he received $40.00 for his part of driving people around.

(8)

Bautista denied that he sexually assaulted Janette.

(9)

At the Conclusion of the interview Bautista agreed to show us where Meno and Paco Lived.

(10)

Bautista directed us to a multi unit apartment building at 854 Harvard street in Los Angeles. Bautista said that Meno sometimes resided at the Harvard address with family members. Bautista stated that Meno's sister was the apartment manager and that she resided in one of the first three apartments on the right hand side of the first floor. Bautista said that Meno Cell phone number was (213) 278-9614

(11)

Thereafter Bautista directed us to 3649 3rd Avenue in Los Angeles Bautista said that Paco Lived in a detached residence at the rear of the residence a 3649 3rd Avenue Bautista said that Paco Lived in a small house with his wife and two children Bautista show us Paco Gray Toyota 4-Runner parked across the street from 3649 3rd plate Bautista had described the 4-Runner and paper plate to us prior to our arrival, Bautista said that Paco Cell phone number was (213) 841-5740

(12)

Bautista was Transported to Glendale City Jail where he was booked and Confined.

At approximately 0200 hours I spoke to Bautista at the Glendale City Jail with the assistance of C.S.O. Jailer Elsa Urquizo. Bautista told me the Last time he was at Paco residence on 3rd Avenue in Los Angeles was previous Saturday Night June 30-2007. Bautista sketched an outline of Pacos residence for me The sketch has been saved as evidence.

Evaluating Statements by Mr Bautista and why Mr Bautista is guilty of the robbery, but not the Kidnapping or any sexual assaults.

Reviewing the police report

Bautista says he dose not want to be involved in any ilegal things or he will tell the police everything.

(Question) (1)

when he witness Paco slashing tires, why didn't he Just Leave? or why didn't he make a phone Call to the police and report a crime was being Commit to someones Vehicle Like he said he would? Instead he follows the Vehicle "why?"

Bautista says that Paco and Meno had ask him if he Could give them a ride to Glendale on Sunday night. And Bautista respond yes.

(Question) (2)

Why did the boys need Bautista? Bautista says Meno was on a Gray Honda Accord park on a side street waiting on "who or what?" ~~And if the boys had a vehicle, this tells the Court~~ Petitioner Bautista services were not needed, So why was he there?

Now take notice there's now Three Cars involved, Petitioner Bautista "Chevrolet Caprice" Meno's "Gray Honda Accord" and Pedro Martinez Brown Honda the Pedro and Janette were in

Evidence and statements on Bautista Police Report proves that there's is more to the case than it's being told. For example notice the dates. They meet on Friday June 2-2007 then they put the plan together on Saturday June 30-2007 at paco's house at a party and Execute it on Sunday July 1-2007.

Another example Petitioner Bautista is instructed to take Pedro Car and move it. He's taking orders from Paco.

By the statements Mr Bautista gave to the police trying to make himself an innocent by-standard. Unknowingly he has told the Court of his involvement with the robbery Concerning the Taco Bell incident.

Ground # 9 109

Petitioner Conviction was obtain do to Ineffective Assistance of Counsel. A Violation of Petitioner's 6th and 14th Amendment Due Process. Therefore Petitioner Challenges Counts 4-14 Oral Copulation (Rape

Supporting Facts

Defense Attorney showed no interest or assistance when Mr Bautista was being falsely accused of Counts of Oral Copulation or Rape.

Defense Attorney did not move to clearly make the Jury understand that D.N.A. from experts clearly excluded Petitioner of any sexuals assaults.

Defense Attorney action and a non-interest in Petitioner case presented no interest of the fundamental right of Petitioner and deprived him his due process.

Petitioner was being falsely accused and Convicted of Committing Rape and Oral Copulation against (Janette A.) when the victim with her own testimony stated. It was Moran who had Commit the Rape and not the Petitioner (vol-5-935-936-937) Then again Expert witness testify that the D.N.A. excluded the Petitioner Bautista as the semen donor "But found a match to Moran" Then Janette said that Petitioner had removed the tape that held her hands tie with his teeth. yet expert did not find any saliva or any mention of any teeth marks seem to have appear on this tape that was brought in as evidence also see (8-RT-2726) and (8-RT-2434 2435) (5-RT-943) Petitioner base his argument on Evidence presented on Transcripts. which points out that there is substantial evidence without a doubt of innocence. Petitioner also argues that the Court itself was put aware of the wrong doing. that the Court seem to ignore. (5-RT 1041) Petitioner ask the Court to witness what Judge Nancy Brown was address Concerning this Case on The "Taco Bell Robbery" also presented will be Evidence of False Accusation, Contradicting Statements Perjury, and How everything Janette and Pedro testify to is Fabricated.

Contradiction, Fabrication Perjury False Accusation

Comparing Pedro Martinez Testimony and Janette Alcazar. Also Questioning their statements.

Comparison on Victims Testimonies Concerning the Taco Bell Robbery CREDIBILITY

Pedro Martinez 4-CT 98-3-8

Q. Now could you describe the Lighting Condition at the shopping Center on windsor and Centeral?

A. yes it was (very bright a Lot of Lights) All the (other stores had their Lights on inside the shopping Center) the shopping Center it's self has different Lights in the parking Lot it's (Like daytime.)

Janette ALcazar 5-CT 921-2-7

Q. The car in? would you Please tell me, Could you describe what was the (Lighting Like in the shopping Center) area that you Called the Plaza?

A. (It was dark) there was--- (It was really dark.) There were no car nobody.

Janette ALcazar 5-CT-923-25-27

Q. Are there (Lights on the building of the shopping Center) if you remember?

A. (NO)

Janette ALcazar 5-CT-923-12-15

Q. And is that street (ILLuminated by the street Lights?)

A. They're (hardly any street Lights) There is but not a Lot (Not much.)

Pedro Martinez 4 CT 100-2-10

Q. Okay, Then what happened?
A. Then (she says the guy has a gun.)
Q. what did you do in response to hearing that?
A. I stand up and I Looked towards, towards Centeral (And I saw this guy Coming with a gun in his hand pointing down) and with a hat on his head

Janette ALcazar 5-CT-926-6-4

Q. what happened next?
A. After the Car disappeared suddenly - well, I ignored it and we started - Peter was Changing the tire, And suddenly this guy Comes in from the driveway with (I Guess) he was Coming Like fast towards us, And he--- (I Guess he had a gun) and he told us (Don't Look at me turn around if you don't I'll shoot you guy and we---)

Pedro Martinez 4-CT-366-18-22

Q. What happened next?
A. He Keep talking to me and also reminding me (not to Look at him.) And asking me about the safe, That if I didn't Cooperate they were going to kill me

Pedro Martinez 1. 4 CT 102-22-26

A. I didn't do anything. I Just stood there until (He hit me).
Then saying he wasn't Playing. that he wanted me to get (inside my Car) with Janette in the back of my Car.

Janette ALcazar 2. 5-CT 929-15-18

So he Jumped to the front, and then Peter Could find the Keys so he (Punched Peter on the stomach with his elbow)

Pedro Martinez 3. 4 CT 324-2-8

A. Some Kind of sticky tape

Janette ALcazar 4. 5 CT 975-7-8

A. yes it was Like---There was---it was Like "another---"

Comparision is Obvious

(1#)

Pedro says he was being punched / hit when he was outside of his Vehicle by Bautista.

(2#)

Janette says Pedro was punch in the stomach by Bautista inside the Car by Bautista elbow because he couldn't find the Keys

(Bautista response)

when Pedro was examine for any bruising injury Marks or signs of anyKind of Physical beating nothing was ever found yet he Claims that he was being beat at Taco Bell in the car outside the car in the parking Lot and being hit with guns and yet not a mark was found to support his statements.

Pedro says it was someKind of stick Tape that Bautista had bound his hands with

Janette in the other hand seem to not really think this was the tape that bound her hands above her head.

(Bautista response)

The tape that was present in Court was a tape that is use in Taco Bell to seal Boxes. And it was bunchup and what seem to be hair on it see(Declaration) and see how this hair got on the tape. Then on (5-CT 942) she maded a statement saying Bautista had use his teeth to rip the tape off her hands. However Evidence would have shown saliva, or teeth marks, or finger prints, of Bautista yet nothing was ever found why?

Take Notice of Statements maded by Pedro & Janette.

Pedro Martinez 4-CT 324-16-21

A. My answer was that I assume he wanted to go and take the money from Taco Bell.

Bautista's Response

Take Notice no one had said or even hint anything about Robberying Taco Bell so why would Pedro say that to a

Supposely Stranger. How would Pedro Know what Bautista intentions were unless Pedro already Know a robbery was to take Place.

Take notice how Pedro trys to Protect (Paco and Mino) 4 CT 341 their talking about when Pedro and Bautista return to tell Mino what had happened when the police pull them over because of the plates

Pg. 341.

Q. Did you hear Janette speak to him when he pulled up next to your Vehicle

A. No.

Q. Did you see Janette when you pull up next to your Vehicle?

A. NO

Q. Did you Know who was inside of that Vehicle?

A. I Know Janette was there with some one else.

Pedro Martinez 5-CT-101-20-21

A. He asked me if the Car was ready. I the tire was fixed already?

Bautista Response

Anyone would Know that if a man with a gun which you've seen and Looking very Suspicious who intentions are to Rob you, Beat you, Kidnap you, and have his way with your female friend. The Last thing in his mind is the Concern if you flat tire is fix and if your Car is ready.

116

Janette ALcazar 5-CT-942

Janette said that the second time Bautista came into Pedro Car. That he showed Concern and ask her if Paco had harm... Then tell her okay pull your pants off And when she refused he then made her put his penis in her mouth.

Ground 10

Petitioner Conviction is based on mere Speculations and a Miscarriage of Justice Which petitioner will present to the Court Evidences and not speculations that said Counts do not apply to Petitioner in a Motion Fashion

Supporting Facts

Petitioner base his arguments on the evidence that he will presented And on that the prosecution fail to present evidence in supporting any of the counts that were imposed. Petitioner was accused and Convicted, do to ineffective assistance of Counsel and mere speculation. And no real substantial evidence of said Counts. These arguments will present what the witness / Victims said did or accused Bautista of doing, then see how it involves Bautista and how the Courts allowed Bautista to be use as an Escape goat. The Court will witness questions and answers that will prove Bautista is innocent with out a doubt.

Requesting Dismissal on said Counts 4-14-1-2-5-6-7 See why on the Taco Bell incident, and a full dismissal on The EL POCO LOCO incident

Elmer R. Bautista V-34019
P.O. Box 3471-3C02-162
CSP Corcoran Ca, 93212-3471

In Propria Persona

United States Southern District Court

Elmer R. Bautista
Petitioner
vs
Darrel Adams
warden & Respondent

Case No. GA-051210
Motion Requesting Dismissal Penal Code 995 on Counts #4 #14

Count (4) 288 (a) (c) (2) Oral Copulation - Count (14) 209 (b) (1) Kidnap (of Janette A.) to Commit rape

Allegations against Mr. Bautista

I was said by Janette that Mr Bautista had Come and got into the Car where he earlyer tied her and Pedro Martinez with some sticky tape (4RT 323-324 5RT 677 929-930) which later that same night removed this tape by using his teeth placing his mouth on the sticky tape and pulling it off of her with his hands. Then she accused Bautista of Masturbating and making her put his Penis in her mouth by Force and making her suck his Penis. Here's why evidence will prove to the court that all her testimony is Fabricated.

(1) Janette Claimed Petitioner Bautista "Came into the car" where she was tied up.

(EVIDENCE)

Expert witness testify in Trial that they had went through the "inside of the Car Looking for Finger prints. And there was no Finger prints of Mr Bautista Found inside the Car.)"

(2) Janette Claimed that it was Mr Bautista who tied her and Pedro up with a sticky tape and it was Mr Bautista who drove Pedro Car. And then Later that Night that it was Mr Bautista who untied her by using his teeth to rip of the tape off by placing his mouth and hands on the sticky tape.

(EVIDENCE)

Expert witness testify in Trial that they check the tape that supposely had hair from Janette head. But "(DID NOT)" Find any ("Teeth Mark") or Mr Bautista "(saliva or his Finger print)" on the tape or Car.

(3) Janette claim he had mastrubated

(EVIDENCE)

Expert witness testify in Trial there wasn't any semen of Mr Bautista found in the (Car) in (Janette Body) or her (Clothes) And there was (No Fingerprints) found in the (Car) she Claim Mr Bautista got in to make her do any of the things she claim happened between her and Mr Bautista, this offense's Never Happened. Yet the Jury Convicted of these Two Counts (4) (14) without evidence and because Petitioner Bautista had no representation when it came to his due process, Or effective Counseling.

Making it Clear

EVIDENCE

Expert D.N.A. witness

stated in Court that there was no evidence of Mr Bautista ever being inside the Car with Pedro Martinez or Janette A. The experts dusted for Fingerprints, Salvia, hair, blood, or Semen inside the Car and found nothing that would Link Mr Bautista as being in this Car of Pedro Martinez, not even on the sticky tape. Read the victims testimony and you'll see that these victims state Mr Bautista was inside the Car doing all Kinds of things. So why isn't anything found that Links Bautista? Now the evidence are here yet the Courts in the state Level insist on ignoring the truth.

Elmer R. Bautista CDC No, V-34019
P.O. Box 3421-3C02-102
C.S.P. Corcoran #1
Corcoran Ca, 93212-3471

California Supreme Court

In Propia Persona:

Elmer R. Bautista Petitioner -VS- D. Adams warden	Case No, GA-051210 Motion to request Counts 1 2 5 6 7 to Be dismissed P.C. 995

All said Counts are P.C. 211 / 2nd degree robbery. Petitioner presents the California Supreme Court with arguments and evidence, that said offense do not apply to him, And that said offense's never took place No #1 #2 #5 #6 #7

FACTS

It was alleged that Mr Bautista was one of the individuals that had in fact Commit the robbery against Mr Martinez Taco Bell and again of a sum of $10.00 from Martinez and for the third time he was accused of a 211 second degree burglary of Taco Bell.

Evidence

In response to these Charges Petitioner presents arguments and request the Court to review statements that were presented on prelim and Trial. Now on the Charges of Robbery not anywhere in the whole Trial dose it

922

Show or present Mr Bautista robbing anything in fact a Taco Bell surveillance Cameras hard drive shows Mr Bautista intering the Taco Bell and his walking behind Mr Martinez and his hands are in his back pockets. These are the images that were pick-up by the surveillance Camera. However I ask the Court to review Mr Martinez actions and to witness how he Volunteerly dose things on his own without being asked by Mr Bautista.

Mr Martinez after realizing that it would be impossible to get into the safe. He gets a plastic bag from behind the Counter goes and opens all three registers takes the money from them places the money in this plastic bag and hands it to Mr Bautista. However the the alarm never goes off, because Mr Martinez "TURN IT OFF." And yet has the nerve to say Mr Bautista assaulted him, when expert witness found no evidence to support that they were an assault. And no where on the Trial or prelim dose it say Mr Bautista ask him to do any of the above. And to add salt to the wound he Claims he threw in $10.00 dollars of his own pocket, plus $300.00 from his own personal saving, and lets not foreget he accused Mr Bautista of removing the surveillance Camera flim, Mr Bautista said he open it and ask me to take it because he had the "KEY". Mr Bautista addmits he was aware of what was happening. And Mr Bautista addmits to being a accomplice to the robbery. But he wasn't alone on this, yet Mr Martinez got rewarded $4,000.00 dollars for commiting a crime. And Mr Bautista recieved

26 years 8 months plus Two Life sentences Just for being there and the Attorney use him as an "excape goat."

Ground [redacted] 10

~~Petitioner Presents the Court with his own Personal Declaration~~ for the Court to reveiw and Compare to the Ground argued.

Supporting Facts

Petitioner Declaration is what actually happened and Petitioner Bautista's intentions are to clear up the record and hope this Case is Presented to Judge Nancy Brown so those who have benefit and used Bautista for an except goat won't go unpunish by the Law I've separate these two Case so that my arguments and evidence may be more clearer to the court and so I can resentence me and see that the only thing I wish to plea guilty to is The Robbery,

My NEXT writ will soon follow

Thank you

Declaration

Mr Bautista introduces to the court his personal declaration of what actually happened. Concerning the robbery that had taken place on the date of July 2-2007 at a Taco Bell Restaurant... And why it is "NECESSARY" that the Court reviews this declaration and Petition and all it Contents. Petitioner with the assistance of another inmate here in Corcoran State Prison wishes to exercise his right to be heard as to what he was told to say nothing of what he Knew by his Defense Attorney. Bautista request that after reviewing this Petition that he is hereby ordered by the Court to return and be brought before the Honorable Judge Nancy Brown who he feels is the only Person in the Court who Knew Bautista was innocent of some Charges... Such as (288 (a) (c) (2) Oral Copulation on (Janette A.) (209 (b) (1) Kidnap of Janette A.) to Commit rape.) Mr Bautista request to be heard and to Comfront those individuals who were as much involved and participated in this Crime. Of the Taco Bell Robbery. And those who have benefit at the expense of sentencing Mr Bautista to Life in prison. Petitioner will present his encounters with each of the individuals and will present error that these individual made in their testimony which will expose them as being involve and Knowing Mr Bautista.

Antonio Moran AKA Paco - Guillermina Jimenez AKA Mina Elmer Rokael Bautista - All Knew each other from parties gathering and in many occasions they met or Came across each other path because of Mr Bautista profession as a

Taxi driver. Petitioner Mr Bautista first encounter with a (Ms Janette ALcazar) was I believe a year or so prior to this incident of the robbery on Taco Bell. In many occasions Mr Bautista pickup Janette A. at her Job, and shopping Centers, Parks, and at parties, or Just gathering. In many occasion Bautista would party with Janette and he remember being introduced to (Pedro Martinez). He remember giving them rides to their homes and at time motels. And when it wasn't Pedro Martinez it would be Carlos, Moran, or Guillermino, and on occasion Bautista she was known as what Hispanics call a (Muñeca) in Translation is a (Toy Doll) or Just a (Toy) which is something you play with for awhile and when tired of it you Just put it away til you get the need to play with it again. Therefore being pick out of a photo Line up or Knowing Bautista by Janette A. and Pedro M. was no great Task, in their behalf. Also Petitioner dosen't wants the Court to think that Petitioner Bautista is here to get vengeances against anyone. Petitioner is making this declaration so that the Court may see what actually happened and how it all came to be.

A.

On Friday night Petitioner Bautista was Call on his Cell Phone and ask to meet with Paco and Mino at the home of Paco sister house or/Apartment. when he arrive the men went outside to talk the Men present were Paco, Mino, Carlos, Pedro, and Bautista, the plan was to make it Look Like a "Pedro and Janette" were Force to assist Bautista and Paco and Mino in the robbery The plan was that Pedro and Janette Vehicle got a Flat and they had Stopped to repair it. (THE TRUTH) the

Car Janette and Pedro were on "NEVER" did have a flat tire, they slash the spare tire with a Kitchen Knife. That's how Janette Knew a Knife was used, and she also Knew where the slash was because she witness the tire being slash by Paco we all witness it. And it wasn't a slash it was a stabbed. So as to the statement she maded as to her discovering the slash on the tire in the dark this is not so.

B.

As to the Car-Jack it was Lay-out on the ground for show in case some-one got suspicious [IF] the investigators would have taken real notice they would have found the Car-Jack was Just carelessly drop feets away from the car and nowhere near the tire that supposely had been flaten. Janette part in The Taco Bell robbery at this time was to be a Look-out while the men made their plans and to all agreed on what was to take place, And what they needed to Know, when Janette warn the men that a Cop was patroling the area. So they moved to a different Place on a side street

C.

Bautista and Pedro got into Pedro Honda and Pedro was driving that's why Bautista finger prints were never found on Pedro steering wheel. Bautista "NEVER" drove Pedro a Car, and Janette was never with them, because Pedro and Bautista were talking about what had to be done.

D.

Paco and Janette had to switch cars with Pedro and Bautista and Mino was standing as Look out as everyone else was switching Car Mino Job was to sit there with a Cell Phone waiting to hear from Bautista and Pedro letting him Know if anything goes wrong. And Paco and Janette were fooling around in Pedro Car in the back seat, It was said that when Paco and Janette were in the back fooling around and Paco was on top of Janette that Janette had layed her head on some sticky tape that is use in Taco Bell to wrap boxes up with therefore when the subject of a sticky Tape being use to bound Pedro and Janette hands came-up Petitioner was dump-founded and Confused, for the mere fact that, Petitioner had no idea what they were blameing him for. Then Janette makes the statement about Petitioner Bautista rip it off her with his teeth (942) yet no saliva of Petitioner was ever found on this sticky tape.

E.

During the time Pedro and Bautista left, Mino was keeping his girlfriend inform of what was going on and who was doing what, and with whom. Mino girlfriend was involved Then Pedro and Bautista set out to do their part when they were pull over by a police Car because the License plate wasn't on right and they needed to fix it. When the police officer Came up to the Car he had a FlashLight and was Looking inside the Car. Pedro advise Bautista to keep quiet and he'd do all the talking because Bautista dose not speak any english any barely understands it. Bautista was ask for his License and he response that he had left them at home However as the officer Continue on asking question Bautista found him-self dumbfounded for the simple reason that Petitioner Bautista "Dose NOT understand English or Reads or write it!" Therefore Pedro found himself in a situation where he Knew he had to do something to Protect his mission and his Accomplice's therefore he become the Translater for Bautista.

(Here's the evidence) that also Proofs Pedro was an accomplićés as well as an inside man... TAKE NOTICE., Pedro Claimed he was being Kidnap, against his will and that Bautista held a gun, to him and that he was be^en^ beaten, and threaten.... However Pedro and Bautista are being stopped by an officer and the Opportunity to say something to the officer presents its self, and he dosen't. Remember, Bautista has no idea what Pedro and the officer is saying to each other, so why not tell the officer he's being Kidnap Beaten Threaten and there's a gun in the Car... Evidence are obvious, therefore all Kidnapping and Robbery Charges "must" be reversed

F.

While driving away Pedro and Bautista decided they'll Let the rest of the accomplice Know what had happened so Bautista drove back and drove up to Mino Car and told him what had happened and Pedro ask where was Paco and Mino answer with a wink and a smile as they all Looked towards Pedro Car they all Laugh and then they Left. Pedro and Bautista arrived at The Taco Bell and Bautista told Pedro this Looks to obvious so they move to a different spot then, Pedro told Bautista "wait til I turn off the alarm them come in follow me and that how Bautista got inside The Taco Bell then Pedro went ahead and hit the Lights and walk over to where the safe was and put his key into the safe went to turn it and ~~nothing happened. He was under the understanding that~~ his key would over ride the "Electronic-Timer" on the safe or atlease that's what he was told. Because the next words that Pedro said in spanish were "That Lying Bitch!" Pedro next action was that of a desperate person, so he walked behind the counter grabbing some plastic bags and started opening and taking money from Cash-register, and placeing it into a plastic bag. After that he hand it to Bautista and order him to get the Video Tape out of the Camera. That why when they presented the NEGATIVE of the tape it showed. Petitioner Bautista walking in with his hand down then places them in his back pockets and Just following Pedro around and watching him from a distant. And then tells Bautista where the "Hitten Video Tape" is and how to take it out with destorying the caseing. See how by his own actions and statements during this "Robbery" shows his an Accomplice and notice whos doing the "Robbery" (1) Pedro used his Key to get inside. (2) He tells Bautista to wait til he turn of the alarm off! (3) He dose not turn the high Lights on. (4) He goes and trys his Key on the safe. (5) He voluntary grabs a Plastic bags and starts taking money from the registers I ask the Court to Listen to his testimony of the inside man and the actions of Janette A. (for example) who ask or told him speaking of Pedro to go through the Cash-register in search for money? Where in his testimony dose he say Bautista ask me about the register? "NEVER"! All this he Voluntary did on his own and the worse part is telling Bautista where the Hitten Video Tape was and how to remove it without damageing the Caseing.

And as For (Janette A) Charges against Bautista they must all ~~be revered for the mere fact that Bautista was never around~~ Janette that night.

G.

Now Bautista and Pedro drove to Pedro Place then Pedro decided to stop and ask Bautista to wait and he ran inside and a few minutes Later Came out and got into Petitioner and request to go to the bank. Pedro then told Petitioner to wait and he walk up to the ATM and made a withdraw Bautista waited outside his Car for until Pedro return and he payed Bautista $40.00 for his services and Bautista drove him to where Paco Mino and Janette were waiting. within second after they arrived everyone started blameing each other and pointing fingers and yelling and so on Petitioner was aware of the robbery and was a participation in it but not on the accusations cerceming Kidnap Rape Oral Copulation. Therefore a revered is in order and a resentencing or a New Trial is in order

Case No GA 051210

In Propia Persona
Elmer R. Bautista

Superior Court Los Angeles
County Los Angeles

Respondent to denial of writ of habeas Corpus:

In response to the denial 11-13-07, Petitioner Bautista, Intention were under good faith to bring these arguments and prove to the Superior Court, Arguments that the Appellate Court presented, Petitioner felt that they were of great interest Concerning and stating the facts of how unfair petitioners Trial had been. Therefore it was a "must-do," in petitioners behalf that he felt it was necessary to represent to the Superior Court with all these arguments and evidence of Ineffective Assistance of Counsel, and Court errors, including District Attorney misconduct. The point that Mr Bautista is hoping to do was to introduce to the Court how the Court knowingly allowed the petitioner to be used as an escaped goat, so that others may benefit. Petitioner request that the Court present proof in how said Crimes apply to Petitioner. Petitioner argued to the Court that he recieved Ineffective Assistance of Counsel and the evidence are without a doubt presented here by Petitioner. "Robbery" Not anywhere in the whole Trial dose it shows

Petitioner robbing anything he was handed a "bag to hold." But who was really robbing the "Taco Bell register" and putting the money in a "plastic bag?" And "who ask him to do it" it was "the petitioner? And why hand it to the Petitioner to hold the Petitioner not once says "give me the bag of money" And where did the money go? Did it in the whole trial stated where the money go or who ended up with it? Now let see the numbers Martinez claimed there were "Three Cash registers and he claims there were $75.00 dollars on each one of them plus he threw in $10.00 dollar of his own pocket plus 300.00 from his own personal saving it comes up to $5.35.00. Now how much did Mr Bautista get paid $40.00 and that was for what? being a taxsi driver to a crime he was aware of. Therefore Mr Bautista dose not denied being a participation to the robbery, however he was not the mastermind or the robber. He was the driver yet everyone of the real criminal received an outdate and the Trial attorney made Mr Bautista look to the jury as if he was the mastermind behind everything. Mr Bautista intentions were for the Court to correct this wrong doing, that had been done to an individual who because he speaks no English, reads it or writes or understands it. Gives anyone the right to take advantage his handycap. Or because he's from other County. (Kidnappin Mr Bautista presented on his declaration that's it impossible to Kidnap anyone when their the drivers or the one's giving you instructions on where to go. (Oral CPLTN by Force) The Transcripts show no where any evidence where it links Mr Bautista to this Crime. So how is it that Mr Bautista must be held responsible for counts that were impose upon him that don't apply to him in any way form or fashion. yet the Court sees no ineffective Assistance of Counsel. And the response for denial is "The Jury found him guilty of said Counts." This is not about the Jury this is about right and wrong, this is about our Laws ignoring the Truth. They the court states that Mr. Bautista had a choice during Trial to say what he Knew, and could have help him in his defense. Again Petitioner Bautista reminds the Court of his declaraion, he was advise by his defense attorney to say nothing therefore ineffective Assistance of Counsel is there. However again the court ignores the evidence and hide the truth by blaming the Jury.

Respectfully Submitted

signature [signature] C.D.C. No. V-34019
Date 1-3-08

MARY JAMESON
AUTOMATIC APPEALS SUPERVISOR
JORGE NAVARRETE
SUPERVISING DEPUTY CLERK
SAN FRANCISCO

NATALIE ROBINSON
SUPERVISING DEPUTY CLERK
LOS ANGELES

Supreme Court of California

FREDERICK K. OHLRICH
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

☒ SAN FRANCISCO 94102
EARL WARREN BUILDING
350 McALLISTER STREET
(415) 865-7000

☐ LOS ANGELES 90013
RONALD REAGAN BUILDING
300 SOUTH SPRING STREET
(213) 830-7570

January 14, 2008

Elmer T. Bautista V-34019
CSP – Corcoran #1
P. O. Box 3471 (3C02-102)
Corcoran, CA 93212-3471

Re: S136719 (B173331) – People v Bautista

Dear Sir:

Returned herein is your document received 1-10-2008. Please be advised that the order filed on 10-26-2005 denying your petition for review is final forthwith and may not be reconsidered or reinstated. As to your other case, B174565, the Court of Appeal docket shows that all documents were refiled in a different case (B173331), which is referenced above.

The court does not state the reason for the denial of petitions brought before it. Please rest assured, however, that the entire court considered the petition, and the contentions made therein, and the denial expresses the court's decision in this matter.

Very truly yours,

FREDERICK K. OHLRICH
Court Administrator and
Clerk of the Supreme Court

H. Miner

By: H. Miner, Deputy Clerk

HM/hm
Enclosures

MARY JAMESON
AUTOMATIC APPEALS SUPERVISOR

JORGE NAVARRETE
SUPERVISING DEPUTY CLERK

SAN FRANCISCO

NATALIE ROBINSON
SUPERVISING DEPUTY CLERK

LOS ANGELES

☐ SAN FRANCISCO 94102
EARL WARREN BUILDING
350 McALLISTER STREET
(415) 865-7000

☐ LOS ANGELES 90013
RONALD REAGAN BUILDING
300 SOUTH SPRING STREET
(213) 830-7570

Supreme Court of California

FREDERICK K. OHLRICH
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

1-15-2007

Elmer R. Bautista, V-34019
P. O. Box 3471 - 3C02-102
C.S.P. – Corcoran
Corcoran, Ca 93212-3471

Re: People v. Elmer R. Bautista, et al. – B173331

Dear Mr. Bautista:

We hereby return unfiled your petition for review, which we received 1-10-2008. A check of the Court of Appeal docket shows that the judgment was affirmed 7-26-2005. This court lost jurisdiction to act on any petition for review 9-24-05. (See Cal. Rules of Court, rule 8.500(e).) Without this jurisdiction, this court is unable to consider your request for legal relief.

Very truly yours,

FREDERICK K. OHLRICH
Court Administrator and
Clerk of the Supreme Court

By: A. Allen, Deputy Clerk

Aa/
Rec.
[redacted]

Court of Appeal, Second Appellate District, Division Five - No. B173331
S136719

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

Filed 10-26-2005

v.

ELMER ROKAEL BAUTISTA et al., Defendants and Appellants.

Petitions for review DENIED.

GEORGE
Chief Justice

VERIFICATION

STATE OF CALIFORNIA
COUNTY OF KINGS

(C.C.P. SEC. 446 & 2015.5; 28 U.S.C. 1746)

I, Bautista E DECLARE UNDER PENALTY OF PERJURY THAT: I AM THE Petioner IN THE ABOVE ENTITLED ACTION. I HAVE READ THE FOREGOING DOCUMENTS AND KNOW THE CONTENTS THEREOF AND THE SAME IS TRUE OF MY OWN KNOWLEDGE, EXCEPT AS TO MATTERS STATED THEREIN UPON INFORMATION, AND BELIEF, AND AS TO THOSE MATTERS, I BELIEVE THEM TO BE TRUE.

EXECUTED THIS 4 DAY OF 15 2008 AT CORCORAN, CALIFORNIA.

(SIGNATURE) [signature]
(DECLARANT/PRISONER)

PROOF OF SERVICE BY MAIL

(C.C.P. SEC. 1013 (a) & 2015.5; 28 U.S.C. SEC. 1746)

I Bautista E AM A RESIDENT OF STATE OF CALIFORNIA, I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE AND AM / A PARTY OF THE ABOVE INTITLED ACTION. MY ADDRESS IS P.O. BOX 3471, CORCORAN, CA. 93212.

ON 4 - 15 2008 IS SERVED THE FOREGOING.

(SET FORTH EXACT TITLE OF DOCUMENTS SERVED)

ON THE PARTY(S) HEREIN BY PLACING A TRUE COPY(S) THEREOF, ENCLOSED IN A SEALED ENVELOPE(S), WITH POSTAGE THEREON FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO PROVIDED AT CORCORAN STATE PRISON.

THERE IS DELIVERY SERVICE BY UNITED STATES MAIL AT THE PLACE SO ADDRESSED, AND THERE IS REGULAR COMMUNICATION BY MAIL BETWEEN THE PLACE OF MAILING AND THE PLACE SO ADDRESSED, I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATE: 4 - 15 2008

[signature]
(DECLARANT/PRISONER)